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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 178.

TUSKEGEE INSTITUTE,

Petitioner,

v.

THE BANK OF NEW YORK, as Trustee of the Trust Established by ARTHUR B. EMMONS, by Indenture Dated May 8, 1916, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY OF PETITIONER TO BRIEF IN OPPOSITION.

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This brief replies to the "Brief in Opposition" of certain respondents, Humphrey, *et al.*

The other respondents, The Bank of New York as Executor of the Will of Julia Emmons, *et al.*, have acquiesced in the petition for certiorari and requested that the same be granted.

Jurisdiction.

The jurisdiction of this Court is demonstrated in the petition for certiorari and emphasized by the grounds sub-

mitted in support of petitioner's pending motion for leave to file in this Court copies of its separate briefs in the Court of Appeals.

Here, petitioner simply points out that the reliance of respondents Humphrey, *et al.*, on two cases in this Court is misplaced. In *Edelman* v. *California*, 344 U. S. 357, the unconstitutionality of a *statute* was not raised on trial as required by state law. In *Lynch* v. *New York*, 293 U. S. 52, it was clear that the New York Court of Appeals could have determined that its own constitution and New York statutes forbade the taxation—an independent state ground for decision.

The Merits.

A.

The Brief in Opposition misapprehends what the courts below did. Those respondents claim there is no conflict of laws question. This record involves conflict of laws, and nothing else, as shown by the following:

1. The original order of the New York County Supreme Court decreed that the moneys should be "allocated to the principal of said trust in accordance with the law of Rhode Island" and the order further provided that corporate distributions "should be governed by the law of Rhode Island, and said Indenture is hereby so construed" (R. 24).

2. The order of the Appellate Division of the Supreme Court, in affirming the original order, recited that it provided that the "Indenture dated May 8, 1916 should be governed by the law of Rhode Island" (R. 212).

3. The Remittitur of the Court of Appeals affirmed the order of the Appellate Division (A. 3 to petition for cer-

tiorari). The Order on Remittitur recited that the initial order, twice affirmed, provided that corporate distributions "should be allocated to the principal of said trust in accordance with the law of Rhode Island", and recited further that corporate distributions "should be governed by the law of Rhode Island" (A. 6 to petition for certiorari).

4. The original petition of the Trustee (R. 71, Paragraph 23) stated the Trustee's understanding that it should apply the "Osborne Rule of New York Law", and the second prayer for relief (R. 74) requested permission to do so.

A conflict of laws issue was framed by the pleadings. All courts below chose the property law of one state, to the exclusion of the property law of another state, to determine conflicting rights to property. The courts below gave legal effect to the words of an instrument in accordance with the law chosen. The courts below did not purport to do anything else. Such respondents are therefore entirely mistaken when they state (Br. in Op., p. 12):

> "Strictly speaking, the dispute does not even involve the conflict of laws."

The laws of the two states are in square conflict. The courts chose Rhode Island law which divested the petitioner of property vested under New York law.

B.

We point out in our petition that this is the first accounting in the history of the trust from 1916 to the present (Petition, p. 8; R. 152). Our adversaries seek to draw attention away from this fact (Br. in Op., p. 5). They assert, with absolutely no support in the record, that stock dividends "were received by the Trustee and were credited to and retained in the principal account of the Trust (R. 163)"

(Br. in Op., p. 5). Their reference to the record is to a stipulated list of "stock dividends declared" during the lifetime of Emmons. The stipulation does not refer at all to "principal".

Thus, the statement of our adversaries is not only totally inaccurate and unsupported by the stipulation, but it is grossly misleading. Moreover, it is in direct contradiction to the Trustee's own understanding as set forth in Paragraph 23 of the original petition (R. 71) that stock dividends were to be apportioned under New York law.

Nor is our adversaries' contention supported by two letters which showed that the Trustee quite early took steps in accordance with New York law in crediting the proceeds of sales of fractional shares to income (R. 171, 181). Apparently, our adversaries contend that Rhode Island law crept in *sub silentio* because the Trustee did not expressly refer to New York apportionment of whole shares in such letters, although its actions were consistent with New York law.

Whatever tenuous inference (which petitioner believes to be in the direction of New York law) might be drawn, would, however, be irrelevant and *de minimis*. Certainly, reference in two letters to $68.88 and $67 (total $135.88) is not an accounting for a $3,600,000 fund. At that time, Emmons would not have been a party to, or had any standing upon, an accounting, and letters from the Trustee could not relate back six and seven years respectively to "reform" the irrevocable New York agreement under seal and "rescind" the New York conveyance of New York property.

Petitioner could, with at least equal justification, ask this Court to determine that New York law governed solely on the basis of two letters (R. 166 and 167) of 1916 and 1917 addressed to Mr. Emmons at 60 Park Avenue, New York City. But where sealed instruments and conveyances are

concerned, we respectfully submit that resort to correspondence is a confession of weakness.

C.

The petition for certiorari points out that an intermediate accounting of the testamentary trust of Mr. Emmons was judicially settled in 1929 (Petition, p. 13, R. 36). Such trust is not before this Court. But respondents claim there is a weakness in petitioner's case, because we do not contend that New York law governs such testamentary trust (Br. in Op., p. 14). In the first place, petitioner Tuskegee Institute admitted the Trustee's original petition which requested permission to apply Rhode Island law to the testamentary trust (R. 71). The record shows that the Will was executed in Rhode Island (R. 94), that Rhode Island property passed thereunder (R. 90, 91), that it was probated in a Rhode Island court, and that the testamentary trustee went into the state of Rhode Island and qualified in Rhode Island state as testamentary trustee (R. 36). Finally, the question of corporate distributions in the form of stock dividends is specifically referred to in connection with the largest asset of the estate passing under the Will (R. 91).

It is not relevant for respondents to tax petitioner for failing to urge here a point for which petitioner has not contended.

It is clear that the character of a New York agreement and conveyance cannot be changed by the fact that eight years later one party thereto transferred different property in a different state.

Conclusion.

Denial of due process of law by judicial decision, twice affirmed in a state's courts, is no less effective to confer jurisdiction on this Court than is abrupt denial in the state's highest court. For the reasons stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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